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No. 03-1569

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DONALD MARTIN,

Petitioner,

v.

DECOMA LOVE-LANE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, NORTH CAROLINA ASSOCIATION OF SCHOOL ADMINISTRATORS, AND NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER DONALD MARTIN

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	1
ARGUMENT	3
1. The Petition Should Be Granted Because The Decision Below Has Grave Policy Implications For Effective Administration Of Our Nation's Schools.	3
CONCLUSION	8

TABLE OF AUTHORITIES

CASES	Page
Anderson v. Creighton, 483 U.S. 635 (1987)	4
Connick v. Myers, 461 U.S. 138 (1983)	3, 5
Crawford-El v. Britton, 523 U.S. 574 (1998)	4
Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949)	3
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	3-4, 7
Pickering v. Bd. of Educ., 391 U.S. 563 (1968)	3, 5
Saucier v. Katz, 533 U.S. 194 (2001)	4-6
Scheuer v. Rhodes, 416 U.S. 232 (1974)	4
Torchinsky v. Siwinski, 942 F.2d 257 (4th Cir. 1991)	5-6
Waters v. Churchill, 511 U.S. 661 (1994)	5
Wilson v. Layne, 526 U.S. 603 (1999)	4
STATUTES	
20 U.S.C. § 6301	6
42 U.S.C. § 1983	4

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are non-profit organizations which represent and advocate on behalf of local school boards and school administrators. Founded in 1937, the mission of the North

[1] The parties' written consent to the filing of this brief has been filed with the Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the amicus curiae and its members and counsel have made any monetary contribution to the preparation or submission of this brief.

Carolina School Boards Association ("NCSBA"), as an advocate for public school education, is to provide leadership and services that enable local boards of education to govern effectively. NCSBA is an educational resource for local school board members, as well as an advocate for the concerns of local school boards in legislative matters and in the state and federal courts. Although participation in NCSBA is voluntary, all 115 county and city boards of education in the state of North Carolina are members. The vast majority of the local school board members represented by the NCBSA are elected, with the remainder being appointed. All of these civic-minded individuals essentially volunteer their time and effort to serve their respective communities.

Since its inception in 1976, the North Carolina Association of School Administrators ("NCASA") has supported administrators in public schools who are charged with making the tough decisions each day so that all students can have quality learning experiences. The Association represents every superintendent in the state. In addition, over 5600 administrators are included in the school district memberships, including over 1700 principals and over 1800 assistant principals. Other members include assistant superintendents and directors who support schools in the critical areas of personnel, finance, curriculum and instruction, testing and accountability, special education, technology, vocational education, food services, and transportation. These are people that the public holds accountable for improving public education.

Founded in 1940, the National School Boards Association (NSBA) is a not-for-profit federation of 49 state associations of school boards across the United States, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands, and Guam. NSBA also represents the nation's 95,000 school board

members who, in turn, govern more than 14,000 local school districts that serve more than 47 million public school students. NSBA is dedicated to the improvement of public education in America.

ARGUMENT

1. The Petition Should Be Granted Because The Decision Below Has Grave Policy Implications For Effective Administration Of Our Nation's Schools.

In his Petition, Dr. Martin explains at length the standards for qualified immunity, *Connick/Pickering*[2] balancing, and the errors committed by the majority of the Fourth Circuit panel addressing his case. While amici agree with each of Dr. Martin's arguments, it is the policy implications of the majority's decision which are of greatest concern to them and, which amici contend, warrant the Court's review of this case.

This Court has recognized that when government officials misuse their authority, "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). However, the Court has also observed that allowing damages suits against government officials can entail substantial social costs as well: "These social costs include the expenses of litigation, the diversion of official energy away from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Harlow*, 457 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

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[2] *See Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

This final concern—that a fear of lawsuits will inhibit public officials from vigorously discharging their duties—is the primary policy consideration underpinning the doctrine of official immunity. *See Scheuer v. Rhodes*, 416 U.S. 232, 241-42 (1974). It is based upon the common sense realization that government cannot effectively function unless public officials have some measure of protection from personal liability for their decisions; without such protection, government would soon be paralyzed by inaction. *See, e.g., Crawford-El v. Britton*, 523 U.S. 574, 590 & nn.12-13 (1998); *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Harlow*, 457 U.S. at 814; *Scheuer*, 416 U.S. at 241-42.

This Court has struck a balance between these competing interests (vindication of constitutional rights and the need for public officials to act without being unduly inhibited) through the defense of qualified immunity. *See Anderson*, 483 U.S. at 638 (explaining that qualified immunity is an attempt to accommodate these "conflicting concerns"). Qualified immunity shields public officials from personal liability under 42 U.S.C. § 1983 "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Harlow*, 457 U.S. at 818).

By allowing officials to avoid personal liability for "reasonable" mistakes of either fact or law, the defense of qualified immunity attempts to balance the need for officials to take quick and decisive action with the need to allow citizens a meaningful opportunity to seek redress for violation of their constitutional rights. *See Harlow*, 457 U.S. at 814; *Scheuer*, 416 U.S. at 240-42; *see also Saucier v. Katz*, 533 U.S. 194, 205-09 (2001) (qualified immunity allows for reasonable mistakes of either fact or law). In order for this balance to work as intended, officials should not be held personally liable for money damages when the state of the applicable law is unclear or when there is uncertainty as to

how the law applies to the particular facts at hand. *See Saucier*, 533 U.S. at 205-09. Otherwise, in close situations, officials would always exercise whatever discretion they are afforded in favor of inaction. *See Torchinsky v. Siwinski*, 942 F.2d 257, 260-61 (4th Cir. 1991) ("If reasonable mistakes were actionable, difficult questions of discretion would always be resolved in favor of inaction, and effective law enforcement would be lost.").

The Court's cases dealing with the free speech rights of public employees have recognized that *Connick/Pickering* balancing is also premised upon concerns that government officials must be able to take personnel actions necessary for efficient operations of the agency: "Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Waters v. Churchill*, 511 U.S. 661, 674-75 (1994) (plurality opinion).

As Dr. Martin pointed out in his Petition, a central issue in this case is how the qualified immunity doctrine is applied in situations where school administrators are called upon to perform *Connick/Pickering* balancing to determine whether an employee's disruptive speech is protected. Balancing of interests tests analogous to *Connick/Pickering* balancing are often employed in the law enforcement context to determine whether police conduct is constitutionally permissible. The Court has observed that because officers face virtually "limitless factual circumstances" in which competing interests must be balanced, a wide degree of deference should be afforded to the officers' judgment. *Saucier*, 533 U.S. at 205-06. Amici contend that the same policy considerations apply in the context of free speech claims by school employees—because

school administrators face a limitless variety of factual circumstances in which they must balance the competing interests of the employee and employer, it should rarely be "clearly established" that the employee's speech was protected. *Cf. Saucier*, 533 U.S. at 205-09.

In his dissent in the case below, Judge Wilkinson astutely observed that the majority's opinion posed a serious threat to effective school administration. "If decisions like Martin's are going to sow the seeds of federal actions, school administrators will either be cowed into inaction or they will seek the greener pastures of private schools, where education, not litigation, remains the top priority." Pet. App. 63a.

Amici, particularly the NCASA, are genuinely concerned about this implication of the majority's opinion. Public school administrators are required to deal with disruptive employees on a routine basis—these dedicated and hardworking public servants should not be put to the difficult choice of facing personal liability or simply choosing not to act. If personal liability is a distinct likelihood (indeed, even in situations where *federal judges* might disagree on whether an employee's rights have been violated), then one can hardly expect difficult or close questions of discretion to be resolved in any fashion other than inaction. Effective school administration would be lost. *Cf. Torchinsky*, 942 F.2d at 260-61.

This matter is further complicated by the intense public pressure for school administrators to act decisively to improve our nation's schools. As this Court is no doubt aware, with the passage of the No Child Left Behind Act of 2001, codified at 20 U.S.C. § 6301, *et seq.*, public school administrators now face unprecedented mandates designed to improve public education by making school administrators more accountable for the progress of students. *See id.* at § 6301(4) (noting that one purpose of the act is to "hold[] schools, local educational agencies, and states accountable for improving the academic achievement of all students . . . .").

In other words, *inaction* is not a viable alternative. Amici respectfully contend that these conflicting concerns underscore the need for clear direction from the Court about the proper application of the qualified immunity doctrine in public employee free speech cases.

Aside from the concern that the threat of lawsuits can unduly inhibit public officials in the discharge of their duties, one of the other important social costs mentioned by the *Harlow* Court was "the deterrence of able citizens from acceptance of public office." *See Harlow*, 457 U.S. at 814. This is a particularly important issue for the NCSBA and NSBA because the vast majority of the local school board members represented by these organizations are elected. While some of these individuals receive small stipends in recognition of their service to the community, they are essentially volunteers. Service on a local school board—while vitally important to the community—is a time-consuming and underappreciated public service. The specter of facing personal liability for an employment decision is, no doubt, a powerful deterrent to many "able citizens" who might otherwise be willing to serve.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to grant Dr. Martin's Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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